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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

In re J.D., a Person Coming Under the Juvenile Court Law.	
SONOMA COUNTY HUMAN SERVICES DEPARTMENT, Plaintiff and Respondent, v. W.B. et al., Defendants and Appellants.	A155129 (Sonoma County Super. Ct. No. DEP-3890)

W.B. (Father) and D.D. (Mother), parents of seven-year-old J.D., appeal from the juvenile court's order terminating their parental rights, pursuant to Welfare and Institutions Code section 366.26.[1] Father contends the court's finding that J.D. is not an Indian child is not supported by substantial evidence because the evidence shows that the Sonoma County Human Services Department/Family Youth and Children Services (Department) failed to fully investigate J.D.'s possible Choctaw heritage or give adequate notice of the proceedings to the applicable tribes and the Bureau of Indian Affairs (BIA), pursuant to the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901 et seq.) and related California law. (§ 224 et seq.) Mother joins in Father's argument. We shall

[1] All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

conditionally reverse the juvenile court's order and remand the matter for the limited purpose of curing the ICWA violations.

BACKGROUND[2]

In September 2016, the Department filed an original petition alleging that then four-year-old J.D. came within the provisions of section 300, subdivisions (b) and (j), based on Mother and Father's propensity for substance abuse. The petition further alleged that Mother had physically abused J.D.'s older half sibling and neglected two other half siblings who were dependents of the juvenile court.

In March 2017, following the jurisdiction/disposition hearing, the court sustained the allegations of the petition, declared J.D. a dependent of the juvenile court, and removed him from his parents' custody. The court further found Father to be the presumed father of J.D., ordered reunification services for Father, and bypassed reunification services for Mother, pursuant to section 361.5, subdivision (c).[3] The court also confirmed a prior finding that ICWA did not apply.

In January 2018, at the conclusion of the combined 6- and 12-month review hearing, the court terminated Father's reunification services and set the matter for a section 366.26 hearing. On April 2, 2018, this court dismissed Mother's petition for an extraordinary writ. (Case No. A153443.)

On June 19, 2018, at the conclusion of the section 366.26 hearing, the court ordered adoption as J.D.'s permanent plan and terminated both parents' parental rights.

On August 13, 2018, Mother and Father filed notices of appeal.[4]

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[2] Because only the ICWA related background is relevant to the issue raised on appeal, we will provide a very brief overview of the history of this case.

[3] J.D. had been the subject of a dependency case in 2012, shortly after his birth, at which time Mother had received reunification services. That case was dismissed in October 2013, when Mother successfully reunified with J.D.

[4] The notices of appeal were received by the trial court on August 13, 2018, which filed them on August 21.

DISCUSSION

The parents contend substantial evidence does not support the juvenile court's finding that ICWA does not apply because ICWA's investigation and notice requirements were not satisfied.

I. *Juvenile Court Background Related to ICWA*

The September 7, 2016 petition indicated that on September 1, Father had "stated there may be Native American ancestry through the Cherokee tribe through his grandmother's side who lived in Oklahoma."

At the September 8, 2016 detention hearing, Father's counsel stated that Father "believes he has [Choctaw, not Cherokee] heritage. His mother may have more information as to other relatives who may know more." Father had completed an ICWA-020 form, "Parental Notification of Indian Status."

In the October 4, 2016 jurisdiction/disposition report, the social worker reported that the paternal grandmother "claims that her father may have Native American ancestry with the Choctaw tribe. [She] reports that her father was born on a reservation in Oklahoma. Notice will be sent to the tribes to determine if ICWA does apply to this case."[5]

In November 2016, the Department served ICWA-030 Notices, "Notice of Child Custody Proceeding for Indian Child" (notices), on the Choctaw Nation of Oklahoma, the Jena Band-Choctaw, and the Mississippi Band of Choctaw Indians, as well as the Secretary of the Interior and the BIA. The notices included the following information: Father's name, current address, former cities and state of residence, birth date, and tribe (Choctaw). No aliases or former street addresses and place of birth were included. The paternal grandmother's name, address, birth date, and tribe (Choctaw) were included in the notice. No aliases or former address and place of birth were included. The paternal great-grandfather's name, former city and state of residence, birth date and state of birth

[5] The social worker noted that J.D. had been involved in a prior dependency case in which it was determined that he was not an Indian child under ICWA. At the time of that determination, however, the identity of his father was unknown.

(Oklahoma), tribe (Choctaw), and date and city and state of death were included in the notices, but no aliases or his former street address and city of birth were included. The notice also stated that the paternal great-grandfather might have lived on a Choctaw reservation in 1901, his year of birth.[6] Copies of J.D.'s birth certificate and the juvenile dependency petition were attached to the notices.

In November 2016, the Choctaw Nation of Oklahoma informed the Department by letter that "[w]e have researched our records with the information you provided us and we were unable to establish Indian heritage, therefore the Indian Child Welfare Act ***does not*** apply at this time. We will be glad to assist in future research if more information becomes available." The Mississippi Band of Choctaw Indians also informed the Department by letter that it had researched its enrollment records and had determined that J.D., Father, the paternal grandmother, and the paternal great-grandfather "are not enrolled member(s) of the Mississippi Band of Choctaw Indians . . . and are not eligible for enrollment with this tribe." The Jena Band of Choctaw signed a return receipt form showing that it had received the notice, but did not otherwise respond to the Department's notice.

On January 10, 2017, the court found that ICWA does not apply.

On March 14, 2017, following the jurisdictional/dispositional hearing, after declaring Father the presumed Father of J.D., the court reaffirmed its finding that ICWA does not apply.

II. *Legal Analysis*

Father contends that the Department failed to fully comply with ICWA's investigation and notice requirements and that, therefore, the juvenile court's finding that ICWA does not apply is not supported by substantial evidence. (See *In re N.G.* (2018) 27 Cal.App.5th 474, 480–481 (*N.G.*) [substantial evidence did not support juvenile court's

[6] Other relatives' information was also included in the notices, but they were not alleged to have Native American heritage.

finding that ICWA investigation and notice requirements had been satisfied and that ICWA did not apply].)

In a recent opinion, the Fourth District Court of Appeal set forth ICWA's notice requirements: "The juvenile court is not authorized to determine ICWA does not apply until (1) 'proper and adequate' ICWA notice has been given, and (2) neither a tribe nor the BIA has provided a determinative response to the notice within 60 days of receiving the notice. ([Former] § 224.3, subd. (e)(3); [citation].)

"An ICWA notice must include, among other things, (1) the Indian child's name, birthdate, and birthplace, if known; (2) the name of the Indian tribe in which the child is a member or may be eligible for membership, if known; and (3) specific identifying information concerning the child's lineal ancestors, including '[a]ll names known of the Indian child's biological parents, grandparents, and great-grandparents . . . including maiden, married and former names or aliases, as well as their current and former addresses, birthdates, places of birth and death, tribal enrollment numbers, and any other identifying information, if known.' ([Former] § 224.2, subd. (a)(5)(A)-(C).)" (*N.G.*, *supra*, 27 Cal.App.5th at pp. 480–481.)

The court in *N.G.* further explained ICWA's investigation requirements: "Juvenile courts and child protective agencies have 'an affirmative and continuing duty to inquire' whether a child for whom a section 300 petition has been filed is or may be an Indian child. ([Former] § 224.3, subd. (a); [citation].) If the court or social worker 'knows or has reason to know' the child is or may be an Indian child, the social worker 'is required to make further inquiry regarding the possible Indian status of the child, and to do so as soon as practicable, by interviewing the parents, Indian custodian, and extended family members' and 'any other person that reasonably can be expected to have information regarding the child's membership status or eligibility' in order to 'gather the information required' in [former] section 224.2, subdivision (a)(5). ([Former] § 224.3, subd. (c);

[citations]; Cal. Rules of Court, rule 5.481(a)(4)(A).)" (*N.G., supra*, 27 Cal.App.5th at pp. 480–481.)[7]

Father asserts that substantial evidence does not support the juvenile court's finding that ICWA does not apply in this case because "[i]t does not appear the Department performed any type of investigation into [J.D.'s] Choctaw heritage by further interviewing the paternal grandmother or [Father]. Logically, if the Department had further inquired, it would have obtained [Father's] former street address and birthplace, the paternal grandmother's aliases, former address and birthplace, and paternal great-grandfather's aliases, former street address and his city of birth." According to Father, the failure to further investigate resulted in incomplete and inadequate notice to the relevant tribes, requiring reversal of the order terminating parental rights.

The Department counters that "it substantially complied with ICWA notice requirements by providing the tribes with sufficient information to determine whether J.D. was eligible for tribal membership . . . . The Department's omission of a few minor items in the notice constituted mere technical noncompliance with ICWA notice requirements." The Department asserts that we should, therefore, find that any error in omitting some information from the ICWA notices was harmless. (See, e.g., *In re Breanna S.* (2017) 8 Cal.App.5th 636, 652-653 (*Breanna S.*).)

"[W]here the record does not show what, if any efforts the agency made to discharge its duty of inquiry [citations], and the record does not show that . . . the ICWA notices that were given included all known identifying information, the burden of making an adequate record demonstrating the court's and the agency's efforts to comply with ICWA's inquiry and notice requirements must fall squarely and affirmatively on the court and the agency. And in the absence of an appellate record affirmatively showing the

[7] The provisions of former sections 224.2 and 224.3 were recently changed, with an effective date of January 1, 2019; however, the notice and inquiry requirements remain essentially the same. (See §§ 224.2, subd. (e)(1) [Department's continuing duty of inquiry includes interviewing, inter alia, parents and extended family members to gather required information]; 243.3, subd. (a)(5)(A)-(E) [listing information notice to tribes must contain, if available].)

court's and the agency's efforts to comply with ICWA's inquiry and notice requirements, we will not, as a general rule, conclude that substantial evidence supports the court's finding that proper and adequate ICWA notices were given or that ICWA did not apply. Instead, as a general rule, we will find the . . . claims of ICWA error prejudicial and reversible." (*N.G., supra*, 27 Cal.App.5th at p. 484.)

In the present case, it is true that by interviewing Father and the paternal grandmother, the Department made some effort to obtain information related to Father's claim of possible Native American ancestry, and thereafter sent ICWA notices to the relevant tribes and other parties. However, considering those interviews, the omission of Father's aliases, if any, his birthplace and former street address, as well as the paternal grandmother's aliases, if any, her former address, and birthplace is puzzling, and not explained in the record. Moreover, assuming neither Father nor his mother were able to provide additional information for the paternal great-grandfather—including any aliases, his former street address, city of birth, and additional information substantiating the belief that he was born on a reservation in Oklahoma—the social worker stated that Father believed the paternal grandmother "may have more information as to other relatives who may know more." There is no indication in the record of any efforts by the Department to ask the paternal grandmother about those other relatives and their possible knowledge or to contact those relatives.

Given the requirement of strict compliance with ICWA, and the potentially catastrophic consequences of noncompliance, we cannot find harmless the Department's failure to follow up with Father and the paternal grandmother and/or other relatives, to ensure that it included all available information in the ICWA notices or, if necessary, to document on the record information demonstrating its efforts to obtain the additional information and the unavailability of the omitted information. (See *Breanna S., supra*, 8 Cal.App.5th at p. 653 ["vigilance in ensuring strict compliance with federal ICWA notice requirements is necessary because a violation renders the dependency proceedings, including an adoption following termination of parental rights, vulnerable to collateral attack if the dependent child is, in fact, an Indian child"].)

The facts of this case are similar to those of *Breanna S.*, cited by Father, in which the Department omitted from the ICWA notices that it sent to the relevant tribe "the maternal grandmother's former addresses and place of birth, the maternal grandfather's current and former addresses, the maternal great-grandmother's place of birth and death and the maternal great-grandfather's place of birth and death. (*Breanna S.*, *supra*, 8 Cal.App.5th at p. 651.) The Department admitted its mistake in omitting some of this information, but argued, first, that there was no indication in the record that certain of the omitted information was known or ascertainable. The Second District Court of Appeal rejected this claim, explaining that the Department seemed to "misapprehend" its " 'affirmative and continuing duty' to make the inquiries necessary to determine whether a dependent child is or may be an Indian child." (*Id.* at pp. 651–652.)

The Department further argued that its mistake in omitting the information was harmless error in light of the substantial biographical information that *was* provided to the tribe in question and the tribe's conclusion that the children were not members of the tribe or eligible for membership. (*Breanna S.*, *supra*, 8 Cal.App.5th at p. 652.) The court rejected this argument because "[s]ome of the omitted information pertained directly to the great-grandmother, the ancestor who the [mother's family] had affirmatively identified as a Yaqui Indian. We cannot say with any degree of confidence that additional information concerning that relative, her husband and her daughter would not have altered the tribe's evaluation." (*Id.* at p. 654.) "Moreover," the court continued, "once ICWA notice is required, as it plainly was in this case, we would be extremely reluctant under most circumstances to foreclose the tribe's prerogative to evaluate a child's membership rights without it first being provided all available information mandated by ICWA." (*Id.* at p. 655.)

As in *Breanna S.*, we cannot find the unexplained omissions of required information in the ICWA notices harmless in the circumstances of this case.[8] We must

[8] Indeed, the Choctaw Nation of Oklahoma stated in its responsive letter that it was unable to establish Indian heritage, but that it would "be glad to assist in future research if more information becomes available."

therefore conditionally reverse the order terminating Mother's and Father's parental rights and remand the matter to the juvenile court for a new ICWA determination, following the Department's full compliance with ICWA's investigation and notice requirements.

DISPOSITION

The order terminating Mother's and Father's parental rights is conditionally reversed and the case is remanded to the juvenile court with directions to order the Department to comply with the investigation and notice provisions of ICWA and the views expressed in this opinion. If, after proper notice, a tribe claims J.D. as an Indian child, the juvenile court shall proceed in conformity with all requirements of ICWA. If no tribe claims J.D. is an Indian Child, the order terminating parental rights shall be reinstated.

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Kline, P.J.

We concur:

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Richman, J.

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Stewart, J.

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